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Evolution & the DUI

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Distributed By:

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Arizona DUI Updates	
Other of All	
And Hot Topics	
d ARIZONA & APAAC 2015 Summer Conference	
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APAAC on Demand	
Basic Motion Practice Rule 404 Presentation	
Victim's Rights Enforcement Corpus Delicti Rule	
Fingerprint Analysis Search & Seizure for Traffic Cases	
Chemical Tests and Second Samples (DUI) Human Trafficking Auto Theft	
Forensic DNA Analysis Special Actions	
DUI (FSTs) ROC Main Program	
Human Elements AZ Compact	
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<u>Rule Changes</u>	
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No. 10	

Rule	Cha	nge
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- Memorandum Decisions may be cited for persuasive value, but only if:
 - 1. issued on or after 1/1/15
 - 2. no opinion adequately addresses issue before court &
 - 3. It hasn't been depublished
- Citation must indicate it's a memorandum decision
- > Must provide either a copy or hyperlink
- > No duty to cite to a memo decision

Rule 111(c), Rules Supreme Ct.

Septime.

Out of State Memorandum Decisions

> Per Justice Pelander - May also be cited



Make Defense do it Correctly

- If defendant cites ensure:
- After 1/1/15
- No published opinion adequately addresses the issue
- Not depublished
- Indicated it is a memorandum decision
- · Provided a copy/hyperlink
- If rule not followed:
- · Call the defense on it!!
- Move to strike

State v. Chacon, No. 2 CA-CR 2014-0150 (App. filed May 28, 2015) Memorandum Decision (copy attached).

- ✓ Issued after 1/1/15
- ✓ Indicates It's a memorandum decision
- ✓ hasn't been depublished
- ✓ provided a copy

Does a previous opinion adequately address the issue(s) before the court ???



State v. Chacon,

▶Issues

- · Denial of motion to continue
- Notice of charges
- Denial of *Daubert* hearing
- Sufficiency of the evidence for (A)(3) DUI charge



What Does This Mean for Minute Entries?

• Ethical opinion 87-14 relies on Rule 111(c)



Content	of (Com	plaints
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- ... The constitutional requirement that a complaint be made under oath is satisfied by an electronic oath, or affidavit containing an electronic signature, made by a law enforcement officer or agency representative under penalty of perjury.
- b. Upon filing a charging document in a criminal case in which a defendant is charged with any offense listed in A.R.5 Title 13, chapters 14, 32, 35 or 35.1 or in which the victim was a juvenile at the time of the offense, the prosecuting agency shall advise the clerk that the case is subject to the provisions of Supreme Court Rule 123(g)(1)(C)(ii)(h).
- Rule 2.3, Rules of Criminal Procedure (amendment)



Post-Conviction DNA Tests

Anyone convicted & sentenced for felony may petition court at any time for DNA testing of any evidence in possession or control of court or state, related to the investigation or prosecution that resulted in the conviction, & may contain biological evidence.

Rule 2.3, *Rules of Criminal Procedure* (amendment)



Grand Jury

Criminal Proc. Rule 12.5
 amended to allow an in-custody witness into grand jury proceedings with guard.



Motion to Vacate Judgment

- Any time after entry of judgment & sentence, upon request of the State, Court may vacate judgment if:
 - Clear & convincing evidence establishes defendant did not commit the offense
 - 2) Conviction was based on erroneous application of the law

Rule 2.3, Rules of Criminal Procedure (amendment)

Rule Changes

- Significant changes to Rules of Civil Appellate Procedure.
- Numerous changes to *ethical rules* responding to changes in technology.
- ▶ Changes to lawyer admission process.

Hot Case Law Topics

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Fourth Amendment Opinions	
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Specific 1	
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Reminders First In wine - Dags 4th Amond - Amond	
First Inquiry - Does 4th Amendment Apply?	
Did defendant have an expectation of privacy?	
2) Was there a search or seizure?	
3) Was there State action?	
If not - 4th Amendment does not apply If yes - was it reasonable, is there a warrant	
exception?	
No.	
· · · · · · · · · · · · · · · · · · ·	1
4th Amendment Reminders	
· Good Faith	
Mistake of fact & law Exclusionary Rule (suppression) is NOT	
automatic	
- Herring v. US, 555 U.S. 35 (2009) If relying on overturned precedent - Davis v. US,	
564 U.S(2011) - Inevitable discovery. State v. Rojers, 216	
Ariz. 555 (App. 2007) • Look for no stop/seizure - Robles	
• AZ no tougher than feds except for home searches	

Voluntariness of Blood Draw

- Blood draw exception to warrant requirement [28-1388(E)] does not apply when person receives treatment against his/her will
- NOTE:
- defendant repeatedly told deputy did not want transport for treatment
- · Deputy gave an ultimatum
- · Should be limited to State Action (Estrada also).

State v. Spencer, 235 Ariz. 496 (App. 2014).

Mistakes of Fact & Law

Can provide basis for a stop/seizure:

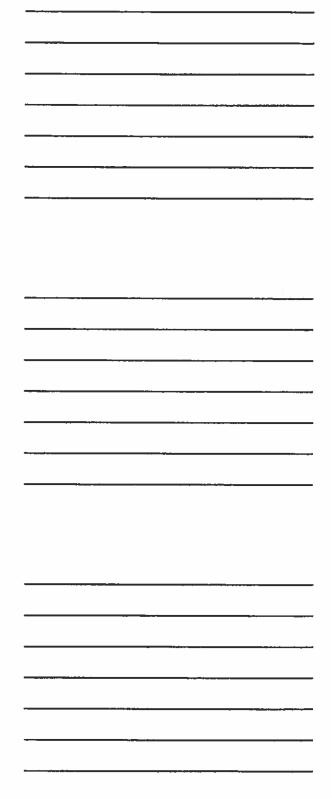
- > If objectively reasonable
- Subjective understanding of officer is not examined

Helen v. North Carolina, 135 S.Ct. 530 (2014).

(Should also apply to other types of searches).

Good Faith Mistake of Fact

- Officer was aware of window tint statute but believed window was darker than allowed
- Court found this was a mistake of fact but with Heien does not matter so much
- Inquiry is was the officer's mistaken belief reasonable?
- Yes tint was dark on sunny day, officer had been correct 99% of time



Use of Criminal History

- Officer may rely in part on suspect's criminal history to form reasonable suspicion
- > Criminal history alone is never enough
- > Totality of the circumstances test
- Def. driving rental car, no personal belongings, explanations were contradictory, extensive criminal record, unlabeled boxes packaged like drugs - this was enough

State v. Woods, 236 Ariz. 527 (App. 2015).

Possible "Innocent" Behavior

- Reasonable suspicion does not require officer to rule out possible alternate, innocent explanations for observed conduct.
- > Court does not have to make such findings.

State v. Evans, No. CR-14-0285-PR (filed 6/4/15)

Terry Frisk at Traffic Stop

- > Traffic stops are not consensual
- Dangerous portion of Terry's "Armed & Dangerous" test is not required for traffic stops
- As long as officer has reasonable suspicion for the stop & suspect is armed

Gastelum v. Hegyi, (Montgomery, RPI) 711 Ariz. Adv. Rep. 4 (App. 2015).

Prolonging Stops - Dog Sniffs

- Police may not prolong a traffic stop for a dog sniff without reasonable suspicion
- Authority for the seizure ends when the tasks related to the stop (getting paperwork, check for warrants, etc.) are or should be complete
- Key issue does the dog sniff prolong the stop

Rodriguez v. United States, 135 S.Ct. 1609 (2015).

Community Caretaking

- Exception to Warrant Requirement
- Good Opinions
 - Becerra
 - State v. Organ, 225 Ariz. 43 (App. 2010).
 - State v. Mendoza-Ruiz, 225 Ariz. 473 (App. 2010).

Community Caretaking & Homes

- Community caretaking exception does not apply to search of homes
- Affirmed exigent circumstances & emergencies requiring immediate attention allow warrantless entry into homes

State v. Wilson, CR-2011- 01027 (Filed 6/3/15).

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Follow-up From Last Year

- *State v. Jacot*, 235 Ariz. 224 (App. 2014).
 - Officer's observation of open front door allowed entry of home under community caretaking exception.
 - Wilson trumps
 - Note: COA in Wilson indicated Jacot correct under exigency theory
 - Careful with word choice may want to bring multiple theories



DUI Opinions

Implied Consent Admonition

Reading "Arizona law requires you to submit to and successfully complete tests of breath, blood or other bodily substance . . ." to DUI suspect did not render consent involuntary.

2 to 1 decision

State v. Valenzuela, 713 Ariz. Adv. Rep. 12 (App. 2015).

Case to watch - Anderson (Division 1)

Rule 702 - Scottsdale Crime Lab

- Evidence is Suppressed under Rule 702(d) only if alleged flaw in the application of the methodology actually make the defendant's evidence unreliable.
- Mere fact the GC at times failed to produce readings did not mean those that were produced were inaccurate.
- No evidence "errors" affected defendant's tests
- > State presented evidence supporting the results
- » "Errors" go to weight, not admissibility
- > State v. Bernstein (Herman, RPI) 711 Ariz. Adv. Rep. 10 (2015).

Retrograde Extrapolation

- Retrograde that did not use a full eating & drinking history was admissible under Rule 702
- State v. Miller (Madrid, RPI) 234 Ariz. 289 (App. 2014).

Blood Alcohol Results

- Expert who did not analyze blood sample may testify, in form of independent opinion, regarding blood results conducted by another.
- When testifying expert provides own opinion, this is witness defense has right to confront.
- Documents were used only for basis of opinion, not to prove their truth, so outside scope of Confrontation Clause.

State v. Karp (Voris, RPI) 236 Ariz. 120 (App. 2014); State v. Fesqueira, 235 Ariz. 470 (App. 2014).

<u>Marijuana DUIs</u>	
Atom.	
<u>Medical Marijuana</u>	
 Marijuana is not a defense under A.R.S. § 28-1381(D) to (A)(3). 	
Neither A.R.S. § 36–2811(B) nor 36–2802(D) provide immunity to	
(A)(3) DUI charges.	
Dobson v. McClennen (Mesa Pros, Office, RPI) 236 Ariz. 203 (App. 2014)(review granted).	
grantes).	

Medical Marijuana

AMMA does not immunize a medical marijuana card holder from prosecution under A.R.S. § 28-1381(A)(3) even when drug is delta-9-tetrahydrocannabinol (THC), an active component of marijuana.

Darrah v. McClennen (Mesa Prosecutor's Office, RPI) 236 Ariz. 185 (App. 2014).

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Harris & Rule 32	
 Harris metabolites (A)(3) opinion was not a significant change in the law 	***************************************
liot a significant change in the law	
Does not entitle one to relief under Rule 32.1	
State v. Werderman, 713 Ariz.Adv.Rep. 23 (App. 2015).	*
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Hot Topic - Vape Pens	1 ,1
The ropic vaperens	
> First generation e-cigarettes resembled a	
tobacco cigarette	
W.	
Service:	
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Oxford Dictionary chose "Vape" as	
the 2014 Word of the Year.	
Fact	
Fast.	

	1
Vape Pens	
 Used with hash oil, wax/concentrates & flowers Typical odor is missing 	
Hillery.	
Actual Physical Control State v. Tarr, 235 Arlz. 288 (App. 2014).	
Appen .	
State v. Tarr, 235 Ariz. 288 (App. 2014).	
HOLDING: Defendant was not entitled to requested stationary shelter instruction	
Defense stationary shelter jury instruction was a correct statement of law	
> Zaragoza instruction adequately instructs the jury on APC	
 Defense view – opinion says I get a stationary shelter instruction 	

Stationary Shelter

- Ct stated: Defendant's stationary shelter instruction was a correct statement of the law
- Court, found defendant not entitled to It & Zaragoza instruction is adequate
- Are comments Dicta?

semper.

Actual Physical Control

This list is not meant to be all-inclusive. It is up to you to examine all the available evidence and weigh its credibility in determining whether the defendant actually posed a threat to the public by the exercise of present or imminent control of the vehicle while impaired.



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Compare Love

This list is not meant to be all-inclusive. It is up to you to examine all the available evidence and weigh its credibility in determining whether the defendant was simply using the vehicle as a stationary shelter or actually posed a threat to the public by the exercise of present or imminent control of the vehicle while impaired

Love, at 326.

> Zaragoza specifically took the "stationary	
shelter" language out	
→ Zaragoza = Supreme Ct.	
 Zaragoza says: "we believe that the following modified form of the RAJI should be used in future actual physical control prosecutions." 	
• Tarr = Ct. of Appeals	
·	CA SUBSECTION - No. 10 - 10 - 10 - 10 - 10 - 10 - 10 - 10
- Attack	
• Zaragoza came after Love	
 The Zaragoza instruction is the exact language from Love without that language 	
Supreme ct. obviously considered the issue and removed the stationary shelter language	, , , , , , , , , , , , , , , , , , ,
> Take copies of both opinions to court	
ed with	
•	
Warn the court regressing	
and basing instructions on	
language from Ct. of	
Appeals Opinions.	
The same of the sa	

Prepare & Propose APC Instructions

- ▶ Definition of Drive [ARS 28-101(17)]
- APC does not require proof the person intended to drive
- ▶ NOT "stationary shelter" if danger exists (Tari)
- · Circumstantial evidence of driving
- APC/DUI can occur on private property



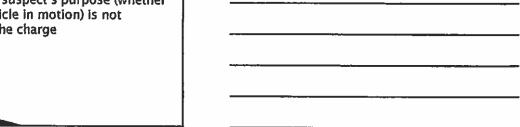
Review, Object To & Modify **Proposed Defense Instructions**

> Change "threat to public" back to "danger to himself or others"



State v. Tarr, 235 Ariz. 288 (App. 2014).

- "Imminent control" language in APC instruction was proper
- > Reiterated a suspect's purpose (whether to place vehicle in motion) is not relevant to the charge



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State v. Tarr, 235 Ariz. 288 (App. 2014). Acknowledged State does not have to elect charges Circumstantial evidence of driving	
AT STATE OF THE ST	1.47
State v. Tarr, 235 Ariz. 288 (App. 2014). • "Imminent control" language in APC instruction was proper	
 Reiterated a suspect's purpose (whether to place the vehicle in motion) is not relevant to the charge 	
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	7
Additional Opinions	

Victim's Rights

- No provision of Victim's Bill of Rights allows victim's counsel to substitute for prosecutor in restitution hearing
- > Substitution is not allowed

Lindsay v. Cohen (Meyn, RPI) 236 Ariz. 565 (App. 2015).

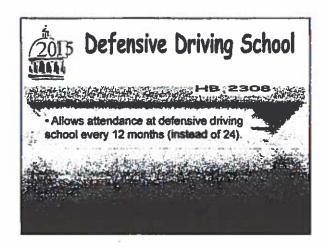
Judicial Notice on Appeal

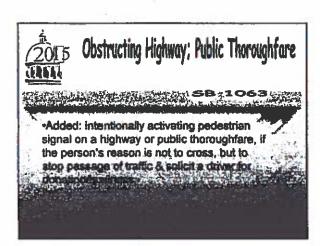
- Appellate Court cannot take judicial notice of a fact that is an element of an offense (whether underlying offense was a felony)
- Jurors must determine whether evidence supported each element of an offense
- Jurors do not have to accept judicially noticed fact as conclusive

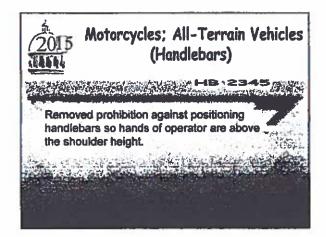
State v. Rhome, 235 Ariz. 459 (App. 2014)

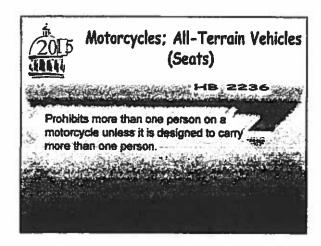


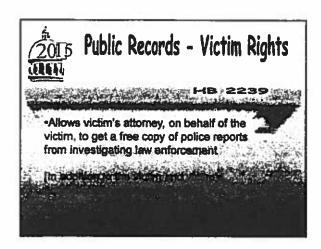
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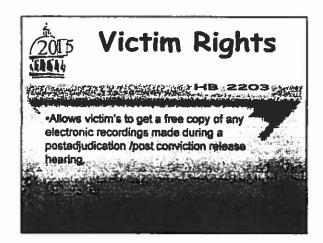


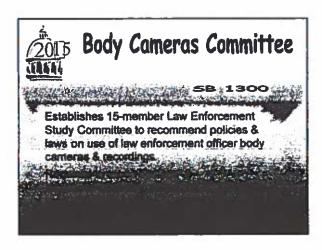


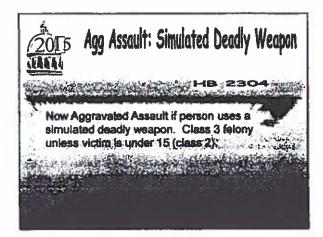












Palcohol

- Governor vetoed bill
- → Will likely see in Arizona
- ▶ Labs say will show up on breath/blood test & PBTs
- Not sure about odor

Additional Hot Topics

- ▶ Defense HGN "Study"
- ▶ 28-644 issues
- ▶ Liquid Mass Spec.

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Thank You!



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